No. 3 Orig.

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JAMES H. McKENNEY,
Clerk

Brief of Post for Defendant

IN THE

SUPREME COURT

Filed May 20, 1901.

OF THE

UNITED STATES.

THE STATE OF KANSAS,
Complainant,
vs.
THE STATE OF COLORADO,
Defendant.

3 Orig'l.
C. T. 1906

Argument Against Filing Motion.

CHAS. C. POST,
Attorney General of Colorado.

CAESAR A. ROBERTS,
JAMES D. MERWIN,
GEORGE M. POST,
Assistants.

THE SMITH-BROOKS PRINTING CO., DENVER.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE STATE OF KANSAS,
Complainant,

vs.

THE STATE OF COLORADO,
Defendant.

Argument Against Filing Motion.

May it please the Court:

The extraordinary demand of the complainant that it may exhibit a bill against Colorado, tending to destroy the political autonomy and sovereignty of that state; that it may nullify the acts of congress;

that it may change laws enacted in aid of commerce and necessities growing out of the condition of the people in the arid land states; that it may enjoin the operation and execution of federal statutes, and legislation by the state of Colorado and legislation by the state of Kansas, and that, too, without joining the parties, both plaintiff and defendant, whose interests are to be affected, present circumstances so unusual that we feel warranted in asking this Honorable Court to allow the defendant to be heard against the motion for leave to file the bill exhibited on the part of the complainant.

Political Questions Involved.

It is asserted in paragraphs 8, 9 and 16 of the motion, that the common law relative to riparian rights has prevailed in Colorado and Kansas since long prior to their admission to the Union.

Colorado in 1876, by its constitution conforming to early territorial legislation and federal decisions, abolished riparian rights if they ever in fact existed.

Art. XVI, Secs. 5, 6.

Which sections are in the words and figures following:

> "Sec. 5. The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

"Sec. 6. The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

Kansas in 1891 gave the right to use the very water in question to irrigators, thus admitting that climatic necessities compelled the recognition of the right to appropriate as distinguished from the riparian or common law right to use the water as it flows, returning it to its channel. Thus both parties now assent together to the destructive use of this water.

Laws of Kansas, 1891, Chap. 133.

Which statute, so far as the same is necessary to the proper understanding of the purposes of the act, reads as follows:

"Section 1. In all that portion of the state of Kansas situated west of the ninety-ninth meridian, all natural waters, whether standing or running, and whether surface or subterranean, shall be devoted first, to purposes of irrigation in aid of agriculture,

subject to ordinary domestic uses, and secondly, to other industrial purposes, and may be diverted from natural beds, basins or channels for such purposes and uses: Provided, That no such diversion shall interfere with, diminish or divest any prior vested right of appropriation for the same or a higher purpose than that for which such diversion is sought to be made without due legal condemnation of, and compensation for, the same; and natural lakes and ponds of surface water, having no outlet, shall be deemed parcel of the lands whereon the same may be situate, and only the proprietors of such lands shall be entitled to draw off or appropriate the same."

But it is more than questionable whether the common law of riparian rights ever in fact attached to this water. It certainly did not as long as it remained French or Spanish territory. If at all, it attached upon or after the cession of the soil to the Federal government. This cession was by purchase and treaties at various dates. Did the constitution by its own force attach such property rights? If not, have they since attached by Congressional legislation? In either case, did they attach upon the creation of Territorial government or upon the admission of States? To determine this incidental or subordinate property right, the court must first determine the entire political status of the newly acquired land to its new government, and whether the land and its people became parcel of the United States proper, or came under the

sole jurisdiction of Congress unrestrained by constitutional limitations. This question has not yet been authoritatively settled, and questions of the law concerning land and water which is part of the land, cannot be reached until the antecedent purely political question is reached, considered and solved.

The necessary effect of the decision in this suit, if favorable to complainant, would be to abrogate provisions of the Colorado constitution, and the policy of the national and state governments as to all their arid lands.

Practice.

While in the case of *Georgia vs. Grant,* 6 Wallace, 241, it was suggested that the practice of hearing motions like the one at bar *ex parte,* would be regarded as that which would prevail, yet in the same opinion the court refers to the case of *Mississippi vs. Johnson,* 4 Wallace, 475, where it was said that under the peculiar circumstances of that case the court thought it proper that argument should be heard on the motion for leave to file.

State of Georgia vs. Grant, 6 Wallace, 241.

We submit that this is the rule to be applied in this case, and that the doctrine as laid down in *Florida vs. Georgia,* 17 Howard, 478, is the practice to be observed upon this motion, where political questions are involved and rights of parties not named in the bill are sought to be adjudicated. As said in this case, the different cases furnish analogies, but nothing more. The proceedings must be moulded in the man-

ner that will most speedily attain the ends of justice and prevent the court having to adjudicate the rights of private parties, which are not before it.

Florida vs. Georgia, 17 Howard, 478.

Jurisdiction.

This court has already decided that it will not exercise its original jurisdiction in a suit between the state on the one side and citizens of another state, and citizens of the same state on the other side.

California vs. Southern Pacific Ry. Co., 157 U. S., 229.

It is shown on the face of the bill that there are now parties residing in the limits of Colorado who had acquired rights to the waters in controversy, in 1854, when the state of Colorado was embraced within the then territory of Kansas, and it is not anywhere sought to make them parties to the bill. It is further shown that the dominant interests in the lands in the Arkansas valley are owned by the Atchison, Topeka & Santa Fe Railroad Company, and that the remainder of the interests, except for less than six hundred acres, are owned by private parties, who are not before the court, and in this respect the court has laid down the rules respecting the joinder and the dispensing with of parties to suits in equity in this court.

Shields vs. Barrow, 17 Howard, 130.

And the third rule mentioned there says: "3. Persons who have not only an interest in the contro-

versy, but an interest of such a nature that the final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience should be made parties."

This rule is referred to in the case of *California vs. the Southern Pacific Railway Company, supra,* and there reiterated as the proper guide to be used in solving the question as to whether the proper parties are before the court.

It is plain, then, that any decision on this bill must affect the vested property rights of people who are not before the court and some of which have been acquiesced in, without objection, ever since the year 1854.

This court being a court of original and final jurisdiction, cannot move until these preliminary questions are settled—that is to say: the question as to whether it will, or will not, take jurisdiction: the nature of the case in which that jurisdiction is invoked, and the nature of the question to be determined. Hence, the rule requiring that the bill be exhibited with the motion for leave to file was made so that the court, by referring to the bill exhibited, might determine not only whether it *can,* but also whether it *ought* to proceed. It is proper to look into this bill and to determine, not only the jurisdiction, the defect of parties, but whether or not congress has already passed upon the questions asked to be determined, and whether the interests sought to be protected are of such general public concern that they appeal to this court as a matter of right.

In the case of *Rhode Island vs. Massachusetts,* the plaintiff filed its bill, the defendant pleaded in bar, the plaintiff filed a replication which it withdrew and moved to amend its bill, and then the defendant moved to dismiss for want of jurisdiction. But, notwithstanding the full appearance and the pleadings, the court, of its own motion, first considered the plea to the jurisdiction, although that was the last filed, and looked into the bill to determine the question of whether it ought to take jurisdiction of the matter, saying that no matter how late the objection to the jurisdiction came, it must be first considered and decided before the court could move one further step in the cause.

Rhode Island vs. Massachusetts, 12 Peters, 657 (718).

Restraining the Operation and Execution of Legislation by Congress.

The court is here asked to interfere by assuming original jurisdiction, not only with the political sovereignty of Colorado, but with the effect of the legislative power of congress heretofore exercised in undertaking the reclamation, irrigation and disposal of the public lands of the United States, situate within the limits of Colorado.

This brings the case squarely within the rule laid down by this court in *Wisconsin vs. Duluth,* where it is said: "That when congress has, by any expression of its will, occupied the field, that action is conclusive of any right to the contrary asserted under state authority."

This was a case where it was complained by the state of Wisconsin that the city of Duluth was destroying a navigable river by cutting a canal parallel to and deeper than the river, by which its waters were diverted and the navigability of the stream destroyed. The court refused to interfere, because congress had provided for the work to be done in the interests of the far greater number who were benefited by the proposed work as against the smaller number who must suffer some hardship and inconvenience.

Wisconsin vs. Duluth, 96 U. S., 379 (387).

That congress has expressed its will in this matter is to be seen from the enactment, being an act "To repeal timber culture laws and for other purposes," in section 4, as set out in foot note below:*

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*Sec. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and also show the source of the water to be used for irrigation and reclamation.

Sec. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same at least three dollars per acre of the whole tract reclaimed.

Sec. 8. That the provisions of the act to which this is an amendment, and the amendments thereto shall apply to and be in force in the state of Colorado.

Vol. 26, *U. S. Statutes at Large,* p. 1096, *et seq.*

That to aid the public land states in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the secretary of the interior, with the approval of the president, be, and he is hereby, authorized and empowered, upon proper application of the state,

That thereafter, by an act approved March 15, 1895, the state of Colorado did accept said act in the following words:

> "That the state of Colorado hereby ac-
> "cepts the conditions of section four (4) of
> "an act of congress entitled 'An act making
> "appropriations for sundry civil expenses of
> "the government for the fiscal year ending
> "June 30, 1894, and for other purposes, ap-
> "proved August 18, 1894,' together with all
> "the grants of land to the state under the
> "provisions of the aforesaid act."
>
> Chap. 70, *Session Laws of Colorado*, 1895, p. 157.

The doctrine of the right of prior appropriation was recognized by the act of congress of 1866, granting right of way to ditch and canal owners.

14 *U. S. Statutes at Large*, 253.

In the case of *Atchison vs. Peterson*, Justice Field, after examining the common law doctrine as

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to contract and agree, from time to time, with each of the states in which there may be situated desert lands as defined by the act entitled "An act to provide for the sale of desert lands in certain states and territories," approved March third, eighteen hundred and seventy-seven, and the act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant and patent to the state free of cost for survey or price such desert lands not exceeding one million acres in each state, as the state may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty acre-tract cultivated by actual settlers within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said desert land law.

Vol. 28, *U. S. Statutes at Large*, p. 422.

to riparian rights held that the equality of right would be incompatible with an extended diversion of water, but that there was no occasion for the application of the common law doctrine of riparian rights with respect to the water of streams on the public mineral domain, and that he who first connected his own labor with property thus situated and open to general exploration does, in natural justice acquire a better right to its use and enjoyment than those who have not given such labor.

Atchison vs. Peterson, 20 Wall., 507 (512).

While it is true that the above case related to the appropriation of water for mining purposes, Justice Field, again speaking for the court and referring directly to the case of Atchison vs. Peterson, says: "The views there expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those States and Territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one."

Basey vs. Gallagher, 20 Wall., 670 (682).

And further on in the same case he says: "It is very evident that congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that the law may be shown by evidence of the local

customs, or by the legislation of the state or territory, or decisions of the courts."

Basey vs. Gallagher, supra, pp. 683-4.

The act of congress above referred to, in *Basey vs. Gallagher,* has been said by this court to be "a voluntary recognition of pre-existing rights of parties."

Broder vs. Water Company, 101 U. S., 276.

Again, it has been held that the waters of a non-navigable stream on the public land are separately grantable by congress.

Howell vs. Johnson, 89 Federal, 558.

The entire system of customs, statutes and decisions of courts in the arid land states has been devoted for more than thirty years to the elaboration of laws for securing to the public and to the individual the most beneficial use and application of waters in the streams within such states. In all instances these waters belong to the public. The lands over which they flow are granted to individuals, subject to the prior acquired rights of those who have legally appropriated such waters. Every arid land state, including the complainant, having in view its own necessities, has passed laws abrogating the common law doctrine of riparian rights.

This has been expressly approved by this court in the case of the *United States vs. Rio Grande Irrigation Company.* The court has examined the rule of the common law, which provides that every riparian owner is entitled to the continuous natural flow of

the stream, and after so examining and stating the law, have further stated that every state has the power within its dominion to change the rule and to permit the appropriation of the flowing waters for such purpose as it deems wise.

United States vs. Rio Grande Irrigation Company, 174 U. S., 690.

As to the navigability of the Arkansas river, it is shown on the face of the bill that it is navigable to Fort Gibson in the Indian Territory, many miles east of the point where it leaves the limits of Kansas. (See third page of bill.)

It is true that there is asserted in the bill a theoretical definition of its navigability, in that it is stated that it is a navigable stream under government and department regulations. (See second page of bill.) But this court has already defined those rivers which must be regarded as public navigable rivers in law, being those which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on waters.

The Montello, 20 Wallace, 430, 439.

It is not contended for one moment by the bill that either within the limits of the state of Colorado, or the limits of the state of Kansas, the Arkansas is a navigable river. On the contrary, the fact is asserted that it is only navigable to a point outside of the state of Kansas. We deem this statement of fact

necessary, because it is the only statement that would give the complainant any standing in this court, namely, the right to file a bill to prevent the diversion of waters from a known navigable stream.

It is stated in the case of the *United States vs. Rio Grande Irrigation Company, supra,* that the power of a state to legislate concerning waters and even navigable waters in the interests of its citizens, is conceded, and that until in some way congress asserts its superior power and declares the necessity of preserving the general interests of the people of all the states, it is assumed that state action, although involving temporarily an obstruction to the navigability of a stream, is not subject to challenge, and that the non-action of congress carries with it an implied assent to the action taken by the state.

It is further stated in this case, after citing the statutory regulations enacted by congress concerning public lands in the arid states, that it is obvious from these acts that congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. It says that this legislation must be interpreted in the light of existing facts, and that in cases of purely local interest, the obvious purpose of congress was to give its assent, so far as public lands were concerned, to any system, although in contravention of the common law rule—which permitted the appropriation of those waters for legitimate industries.

Taking the case in its strongest light, it does not present a matter where this court should take and exercise its far-reaching jurisdiction, when that jurisdiction is invoked to restrain the operation and en-

forcement of the legislation of congress and state legislation in aid thereof.

Impracticability of Granting the Relief Sought.

Let us assume, for the purpose of argument, that the motion is allowed, the bill is filed, the suit is tried, and that the decree of this court is handed down enjoining Colorado from diverting any waters from the Arkansas river. It will be borne in mind that by complainant's own bill, the right to these waters accrued to settlers in 1854, so that practically the state of Kansas is seeking to enjoin one part of its then domain from exercising certain rights that others may exercise them. It is unquestioned that these rights really attach as early as 1849. As early as 1866 congress recognized the right. Hence for at least thirty-five years these rights have been used and enjoyed, and property of enormous value has been acquired by that use and enjoyment. Now comes an application for the decree of this court which in effect shall declare that people (not before this court) must forego the right to their usual pursuits and usual business and permit their property to become absolutely destroyed, and the lands that have been cultivated for years to return to their arid and desert character. The necessities of life are such that no people would submit to any such wholesale destruction of their private interests for the sake of upholding a theoretical right to the natural flow of a stream. The people refuse to obey; the state cannot coerce the settlers without a nullification of its own laws, and in a matter where such settlers have never been heard, or had their rights adjudicated, the state is in the peculiar posi-

tion of being enjoined by this court while its settlers are in the position of holding title in compliance with the acts of congress to the waters, which the state forbids them, under decree of this court, to use. Now, what power can this court exercise to enforce its decree? Can it invoke the military power? Can it invoke the power of congress? To do this latter would be for congress to nullify its own legislation as expressed in the statutes from 1866 to the present time.

Such action follows squarely within the circumstances contemplated by this court in the *State of Mississippi vs. Johnson.* The court there stated that it was fully satisfied that it had no power to enjoin the president in the performance of his official duties. It follows, upon the same lines, that this court has no power to enjoin the operation and execution of congressional legislation concerning its public lands within the limits of Colorado.

Mississippi vs. Johnson, 4 Wall., 475 (500-601).

No Equity in the Bill. Riparian Rights Not an Element of Sovereignty.

This bill is asked to be filed against Colorado to enforce a recognition by the state of Colorado of the common law doctrine of riparian rights. Such rights, in their very nature, never were, and never could be, an element of sovereignty. They attach to the owner of the abutting soil upon the stream, and if injured, such owner has his remedy at law in damages against the party or corporation causing the injury. There is nothing, either in precedent or analogy which justifies a state in instituting an action based on such

a wrong. Complainant alleges ownership in two small sections of land used for state purposes. She pleads no special injury to these differing to that pertaining to other lands, and the injury of which she complains is not done to her sovereignty *as a state,* but to her ownership of said lands as an *individual.* The trustees of the institutions whose premises are injured should bring suit against those committing the wrong. The mere fact that Kansas, instead of John Doe, owns the lands in question cannot change the legal *status* of her ownership nor permit her to go into a court of equity when she has full and complete remedy at law.

We submit that in view of the political questions involved, the operation of state and national legislation to be enjoined, the rights of parties who are not before the court and the easy redress at law for all the damages alleged, all show a case for private relief at law and not for the exercise of equity jurisdiction by this court. Hence the filing of the bill should not be permitted.

Respectfully submitted,

CHAS. C. POST,
Attorney General of Colorado.

CAESAR A. ROBERTS,
JAMES D. MERWIN,
GEORGE M. POST,
Assistants.

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Off. of Rogers for Ditch Co.

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Defendant.

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O. T. 1906

PETITION FOR LEAVE TO FILE BRIEF CONTRA COMPLAINANT'S MOTION AND BRIEF IN SUPPORT THEREOF.

PLATT ROGERS,
Attorney for the Arkansas Valley Ditch Association.

The Evening Post Job Printing House, New York.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE STATE OF KANSAS,
Complainant,

vs.

THE STATE OF COLORADO,
Defendant.

PETITION.

The Arkansas Valley Ditch Association, by Platt Rogers, Esq., its Attorney, respectfully represents:

I.—That it is a non-incorporated association of all the irrigation companies, organized for the pur-

pose of constructing canals and reservoirs, diverting the waters of the Arkansas River in the State of Colorado, and delivering the same for irrigation purposes, upon the lands lying along the course of said stream.

II.—That by the Articles of Incorporation of the Associated Companies and by virtue of the statutes and the decisions of the courts of Colorado, each of said companies is the trustee of the persons entitled to the use of water from its canals and reservoirs, and as such charged with the duty of defending their rights against destruction or impairment.

III.—That said Associated Companies have been organized from time to time during from ten to forty years last past, and have constructed and operated several thousand miles of canals and reservoirs covering upwards of 30,000 acres of surface capacity, and have reclaimed from an absolutely desert condition, and irrigated upward of 300,000 acres.

IV.—That in the construction of said canals and reservoirs, and in the purchase of land thereby reclaimed, there has been expended by said companies and by the divers owners of lands irrigated by said ditches and canals, upward of $25,000,000.

V.—That the building and operation of said canals and reservoirs and the irrigation of lands thereby has caused towns and villages to grow up at frequent intervals along two hundred miles of the course of said river and its tributaries in the State of Colorado, with an aggregate population of over fifty thousand

people, many of which exist only because of the irrigation of adjacent lands.

VI.—That by reason of the reclamation of the lands in the Arkansas Valley, sundry large factories have been constructed for the conversion of the raw products of the soil into merchantable articles, there being expended in the erection of factories for the manufacture of sugar from sugar beets alone about $1,500,000.

VII.—That many of the irrigation enterprises, the works of which have been recently completed, involved an expenditure of over $5,000,000, and the lands thus reclaimed must be speedily sold to save the investors from heavy losses.

VIII.—That by reason of the favorable conditions of sunshine and artificial irrigation, the fruit, melons, sugar beets and other products of Canon City, Rocky Ford, Holly and intervening localities, have become famous in the leading markets of the United States, and home seekers from Eastern States attracted thereby, are daily visiting the Valley with a view of investing in and settling upon and cultivating the lands thus reclaimed.

IX.—That for more than forty years last past, the right to divert the waters of the Arkansas River for irrigation has been exercised with the full knowledge of the State of Kansas, and the several riparian owners along the course of the river in said State, and no legal proceedings have heretofore been taken to prevent the same, nor has the right to do so been mooted, except as incident to the motion now pending in this Court.

X.—That many thousand acres of said lands have been settled upon and reclaimed by irrigation and title thereto obtained in compliance with and in reliance upon the several Acts of Congress concerning desert land, and large sums of money have been invested in irrigation works, in compliance with and in reliance upon the validity of the sundry acts of Congress granting rights of way for canal and reservoir purposes.

XI.—That the single object of the bill prepared upon behalf of the State of Kansas, is in a proceeding in which the State of Colorado is alone made party defendant, to obtain a decree declaring that appropriations of water from the Arkansas River, in Colorado, are illegal, as against the State of Kansas and the riparian proprietors along said river in Kansas.

XII.—That as the value of every acre of irrigated land in Colorado and elsewhere in the arid region is given to it by the right to divert and apply water thereto, it must be obvious that a proceeding authorized, or in the discretion of this Court permitted, in which the sole matter of inquiry is the existence of such right, must, during its pendency, cast a cloud upon the title of every property owner in the Arkansas Valley, and by similarity of conditions, upon all titles in the several valleys of that State, the streams of which continue into adjoining States and Territories.

XIII.—That a necessary result of granting leave to file a bill in this Court in proceedings in which

this Court reserves the right to inspect the bill before granting such leave, is, in view of its unavoidable publicity to give cause to cautious and desirable land seekers and others desiring to settle in the irrigated portions of Colorado, a belief that the right to divert water for irrigation is in doubt, and to deter them from settling or investing.

XIV.—That, in the opinion of the several attorneys and solicitors of your petitioner and its Associated Companies, the matter set forth in the bill tendered for filing by the State of Kansas does not disclose a controversy between the State of Kansas and the State of Colorado, within the meaning of the Constitution and Statutes of the United States, which create and define the original jurisdiction of this Court.

XV.—That, as such objection to the bill goes to the jurisdiction of this Court, it ought, in view of the vast interests involved, and the destructive consequences of improvidently allowing the bill to be filed, to be met and passed upon at the first stage.

Wherefore, in view of the foregoing and other equally valid reasons which must appeal to the Court, in elaboration thereof, it is respectfully prayed that leave be granted your petitioner, by its attorney, to file the accompanying Brief in support of the objections heretofore made by the Attorney-General of Colorado to the granting of leave to file the bill tendered, and that said Brief be duly considered in connection with said objections.

PLATT ROGERS,
Attorney for the Arkansas Valley
Ditch Association.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE STATE OF KANSAS,
Complainant,

vs.

THE STATE OF COLORADO,
Defendant.

BRIEF IN SUPPORT OF OBJECTIONS TO LEAVE TO FILE BILL.

It is the purpose of this brief to bring to the attention of the Court two things:

I.—The bill tendered for filing by the State of Kansas does not disclose a controversy between the

State of Kansas and the State of Colorado, within the meaning of the Constitution and Statutes of the United States, which create and define the original jurisdiction of this Court.

II.—If such controversy is not disclosed, the obvious and necessary consequence of allowing the bill to be filed, to be disposed of by proceedings in the ordinary course, is, during its pendency, to unjustly cast a cloud upon the title of all irrigated land in Colorado.

Of course, so far as the published opinions of the Court give information as to the practice, we know that applications for leave to file bills in original proceedings are usually heard and passed upon *ex parte*.

Georgia *vs.* Grant, 6 Wall., 241.

At the same time, the case of Georgia *vs.* Stanton, 6 Wall., 77, advises us that a case may be presented in which leave to file will be denied. If such a case is presented once, it argues very strongly that it may be presented a second time. In any event, it seems to us that in the exercise of the extraordinary jurisdiction of this Court, incident to alleged controversies between States, its own dignity and purity and the general public weal would be best subserved, by excluding from its dockets any and all cases that upon the face of the bill do not disclose a controversy within the meaning of the Constitution.

Unless the bill states a case of that character, the Court has no jurisdiction, and in view of the fact that by the rules a bill tendered by a State cannot be filed, until proper notice has been given to the defendant State, it would seem that the question of jurisdic-

tion might properly be raised by the latter in resistance of the motion for leave to file. Against the duty in a proper case to grant leave to file a bill, is the duty in an improper one, to refuse. So long as the rule prevails of inspecting a bill before allowing it to be filed, so long is the Court under the obligation to protect the defendant State from the burden of contesting a proceeding which lacks jurisdictional averments. If one in good faith should call the attention of the Court to fatal objections to a bill offered, even though they might not be noticed by the defendant State, we have no doubt they would receive consideration, and the filing of the bill would be denied upon the Court's own motion.

As one State has the right under the Constitution and laws, to cause another State to be summoned to this Court in a proper case, by like reason the latter should not be summoned if the case is not a proper one.

There must be a distinction between private litigants in *nisi prius* Courts and sovereign States as parties in the greatest tribunal known to Christendom. In hearing and disposing of controversies between States, this Court, in principle, and as in fact, would be the case, except for the Federal compact, acts in an international capacity. Unless an appeal to its power to settle disputes be mutual, it ought not to use its compulsory process, except upon a clear *prima facie* right to relief.

In our judgment, the allegations of the bill neither require nor justify this Court in assuming jurisdiction for any purpose whatsoever.

In declaring that the judicial power of the Supreme Court should "extend to controversies between two "or more States," the Constitution of the United

States did not mean that the initiation of legal proceedings by one State against another should constitute a controversy. On the contrary, whether there is a controversy, must be determined by the matter in dispute. As said in New Hampshire *vs.* Louisiana, 108 U. S., 76, "One State cannot create "a controversy with another State within the "meaning of that term as used in the judicial "clauses of the Constitution by assuming the pros- "ecution of debts owing by the other State to its "citizens."

What is the controversy sought to be brought here for disposition?

It is so simple, direct and free from ambiguity that for once counsel are in agreement respecting it, and the Court need keep nothing in reserve for further explanations.

It is alleged that the Arkansas River rises, and for approximately 280 miles, flows through the State of Colorado (p. 1), and then for 310 miles through the State of Kansas (p. 3).

It is also alleged that when the Territory of Kansas was organized in 1854, it included all the drainage area of that river, now in Colorado, and that the common law and riparian rights extended over the whole of the Arkansas Valley, and that by reason of prior settlement, occupation, &c., the State of Kansas and the owners of land upon the banks of said river in Kansas acquired and now have the right to the uninterrupted and unimpeded flow of all the waters of said river into and across the State of Kansas (p. 21).

It is further alleged that by the Constitution of the State of Colorado, adopted in 1876, the waters of any natural stream not appropriated is declared

to be the property of the public and dedicated to the uses of the people of the State, subject to appropriation, and that the right to divert unappropriated waters for beneficial uses shall never be denied (p. 14).

It is also further alleged that the Legislature of Colorado has from time to time authorized such diversions, and that upwards of one hundred and fifty persons, firms and corporations have constructed canals, ditches and reservoirs diverting the water from said river, and using the same for irrigation at great distances from their natural channels (pp. 15, 16).

In addition to the foregoing are sundry allegations concerning the manner in which title to the lands in Kansas were acquired, the fertility of the soil, the value of the underflow to adjacent land, the value of the evaporation from the river to the health of the people, the effect of diverting the water in Colorado upon agriculture, pasturage, the channel of the river in Kansas, and the amount of taxes that might otherwise be collected.

In fact, if the pleader is to be believed, Kansas has continued to bleed for more than a quarter of a century without protest

Now, it must be apparent that as the major premise of the bill is the right of the riparian proprietors in Kansas to restrain the diversion of water by appropriation in Colorado, all these details of wrongs inflicted and injuries suffered are of no legal value.

If the premise is well taken, then under the authorities stated by the Attorney-General in his brief, the water must continue to flow down, not because of the fertility of the soil of Kansas, the value of

the underflow, the beneficial effect of evaporation on health, or the increase of taxable values, but solely and alone, because it is the right of the riparian proprietors in Kansas to have it flow as inseparably annexed to the soil.

If, on the contrary, it should happen that the doctrine of riparian rights in Kansas does not override the doctrine of appropriation to beneficial uses in Colorado, then the injuries portrayed must be relegated to the receptacle of cases *damnum absque injuria*.

Of course it is well understood that the bill was loaded up with details of the dire consequences to the State and its citizens of the disregard by the irrigators of Colorado, of the sacred doctrine of riparian rights, that the case might be made to resemble for purposes of jurisdiction that of Missouri *vs.* Illinois. There is, however, no escaping the fact that if the riparian proprietors in Kansas cannot in their own right restrain the appropriators in Colorado from diverting the water of the river, the State of Kansas cannot by any collocation of alleged wrongs, do so.

There is no particular use of dwelling upon the various pretenses of this bill, as their fallacy is apparent upon reading them. The State is [illegible] made to figure in every attitude from guardian of the public health and welfare to the private ownership of 126.51 acres of unstated frontage on the river. It is also the owner of certain other lands, not riparian, for which it thinks it ought to have the benefit of sub-irrigation by the underflow of the river. These allegations of injury to the private holdings of the State were made for the same purpose and in legal effect are on a par

with the allegations in the bill in Georgia *vs.* Stanton, *supra*, where it was alleged as an obvious makeweight that the State of Georgia was the owner of a Capitol and other buildings, which might be destroyed or lost, if Mr. Stanton enforced the laws of Congress.

The brief of the Attorney-General of Kansas furnishes all the law necessary to dispose of the matter now presented. Pages 2 to 12 inclusive, set forth the right of riparian proprietors, and the various citations, together with comments of counsel, abundantly prove that the right inheres *in the riparian land* and the proprietor thereof, and that *no one other than a riparian proprietor* can complain of an invasion of that right. Note the quotation on page 5 from Washburne on Easements:

"The right of enjoying this flow without disturb-
" ance or interruption by any other proprietor is
" one *jure naturæ*, and is an incident of property
" in the land, not an appurtenance to it, like the
" right he has to enjoy the soil itself in its natural
" state unaffected by the tortuous acts of a neigh-
" boring landowner."

The next paragraph quoted says that the right can be lost by grant or twenty years' adverse possession, and the same principle is again stated on page 12.

Now it seems to us that whether the right may be lost, and by whom, will furnish a most excellent test as to whether the State of Kansas has an actionable interest in the flow of the Arkansas River. Suppose a riparian owner in Eastern Kansas should bring an action against

an appropriator in Western Kansas, and the latter should allege and prove either that for a consideration the former had conveyed his right to the latter, or that for more than twenty years he had diverted all of the ordinary flow of the river, with the declared purpose of holding adversely to the riparian owner, and that expenditures and improvements were made upon the basis of such adverse claim, with the knowledge of the riparian owner, would not the latter be concluded? Or, suppose similar circumstances in an action instituted in the Federal court against a proprietor in Colorado. Would not similar results follow? Again, suppose that in sundry suits by all the riparian proprietors in Kansas ~~and Colorado~~, the same conditions appeared, and that by the several judgments, the right of the appropriators was confirmed, would the State of Kansas, nevertheless, have a right of action to restrain diversions in Colorado? To us a negative answer seems obvious. If so, then the riparian right is a subject of exclusively private ownership. If the State ever had a right by reason of its sovereignty, it certainly could not lose it by any act of its citizens. If, on the contrary, the right may be sold, waived, surrendered or lost by the riparian owner, then the State never had a right.

The brief of the Attorney-General assures us at page 2, that the question of the complainant's right to the relief it seeks, is to be determined entirely by the rules of the common law.

It will be observed that to sustain this contention, the only common law cited is that which deals with the rights of a riparian owner. Not a word is quoted to show that a State may avail itself of some one's else cause of action.

So far as the exposition of the common law is carried by the brief, it is entirely satisfactory, since it establishes that for which we contend.

FIRST.—That the right to have the waters of a given stream (unnavigable, of course) flow *ut currere solebat* undiminished, is purely and exclusively a personal right of the riparian owner.

SECOND.—That the right may be lost by contract, waiver, adverse possession, &c., without power in the State to say nay.

But it may occur to this Court that possibly the State of Kansas is suing to protect its personal and private right as the owner of 126.51 acres of land with the unstated water front. Such a suggestion, however, will not be made by the Attorney-General. In his brief p. 13) he says: "The State of Kansas is a party to "the proposed suit in virtue of its sovereign and "corporate capacity. It seeks to protect the right "and property of its citizens from wrongs and in- "juries against which said citizens neither individu- "ally nor collectively can claim protection in any "court."

This makes it clear that the loss of the flow of the Arkansas River over the 126.51 acres of land is not the State's cause of complaint. In the statement of the Attorney-General just quoted, as well as in the one on the bottom of the same page, a most extraordinary suggestion is contained. After setting forth on twelve pages of the brief the law establishing the rights of the riparian owner against those

interfering with the flow of the river, he immediately follows it with the declaration that "for wrongs and injuries against such citizens, "they can neither individually nor collectively "claim protection in any court." And again, that "if the proposed suit cannot be maintained by the "State of Kansas in behalf and for the protection "of its citizens *who are riparian owners* in the "Valley of the Arkansas River, there is no means "known to the law by which those citizens can be "protected against the wrongs and injuries alleged "in the bill. There is no forum in which their "complaint can be heard or their grievances re-"dressed." Oh, impotent common law! Oh, false maxim! *Ubi jus ibi remedium.* And yet, with characteristic Kansas inconsistency, the brief immediately proceeds to apply the axe to this assertion by referring to the case of Pine *vs.* Mayor, &c., 103 Fed., 337, in which it appeared that the riparian owners in Connecticut were able to protect themselves against wrongs and injuries threatened by the City of New York. The counsel should also have been familiar with the recently decided case of Howell *v.* Johnson, 89 Fed., 558, in which a citizen of Wyoming was able to protect his right to water by an appeal to the Federal Court sitting for the State of Montana against a citizen of Montana. Of course it will be answered to this that it was meant that they could not bring suit against the State of Colorado. If so, then a happier use of language should have been employed, as the right to relief, except by this proceeding, is denied by the brief without qualification.

But is the State of Colorado the party from whom the relief only can be obtained? In fact,

is she a necessary or even a proper party under any view that may be taken? Who are diverting the waters of the Arkansas River in Colorado? The Bill says "upwards of one hundred and "fifty persons, firms and corporations" are doing so. Are not these the "persons, firms and corpora- "tions" committing the wrongs and injuries complained of in the Bill? May they not be reached through the Federal court? If the common law prevails in both Kansas and Colorado, and the riparian owners in Kansas have rights which "persons, firms "and corporations" in Colorado are invading, the Federal court is the proper forum, just as upon the same state of facts, the courts of Kansas are the tribunals in which the riparian owner in Eastern Kansas may bring to task the appropriator in Western Kansas.

But it is said that Colorado has a Constitution and laws permitting and authorizing the diversion of water, and therefore she should be the defendant.

We have already shown that there is nothing in common between the State of Kansas, in its sovereign capacity, and the riparian owner in Kansas. We now proceed to show that there is nothing in common between the State of Colorado and appropriators in Colorado. The same logic which establishes the fact that although Kansas may have adopted the riparian doctrine, she has not thereby acquired any sovereign justiciable right in the flow of water, will also establish the fact that although Colorado has adopted the doctrine of appropriation for beneficial uses, she has not thereby been vested with any sovereign justiciable right in maintaining or defending the doctrine of appropriation. The policy and law of Colorado are one thing. The

question of their efficacy, when relied upon by the "persons, firms and corporations" making appropriations of water is quite another.

If, as contended by the Attorney-General, the common law prevails in both Kansas and Colorado, the Federal court when applied to by the riparian owner in Kansas against the actual appropriator in Colorado, will make short shrift in that respect of the Constitution and statutes of Colorado.

Suppose the case proceeds, and it is held that the State of Kansas is not entitled to relief, may that judgment be pleaded as *res judicata* in a proceeding by a riparian owner in Kansas against an appropriator in Colorado? Does the case of the riparian owner in Kansas stand or fall by the success or failure of Kansas in this proceeding?

Suppose again that judgment is rendered against Colorado, can that judgment be pleaded as *res judicata* against the appropriator in Colorado? Are the claims of right to appropriations of the "persons, individuals "and corporations" in Colorado, upon the strength of which they have expended millions of dollars, to be forever foreclosed by a proceeding in which they are not parties? If not, what does a judgment against Colorado secure to the State of Kansas? Can the State of Colorado, as a defense to the bill, set up all the individual cases waiving, selling, or losing by adverse possession the rights of designated riparian owners in Kansas? If not, may they still be relied upon by the individual appropriator in Colorado? These and a multitude of like troublesome questions may be asked, which would phase even a Kansas man.

If we test the nature of this proceeding and the

jurisdiction of this Court by the prayer of the bill, the conclusion already drawn will again follow. It is desired that the State of Colorado be restrained from authorizing the diversion of water from the Arkansas and from granting any right to extend ditches and from itself constructing ditches. This means nothing more or less than that the State of Colorado shall waive and abandon its policy of internal development and conform its laws to those of Kansas. If this be possible, this Court, under the pretext of controversies between States, could very soon solve the problem of securing uniform laws. The error of the Attorney General, it seems to us, lies in the assumption that the legislation of Colorado respecting irrigation, *ipso facto*, operates to deprive the riparian owner of Kansas of the flow of the river. In other words, it is assumed in harmony with the late prevailing view in Kansas, that as legislation makes value, so legislation is the same as the thing itself. Now, all the legislation Colorado might conceive and enact, even aided by the broad constitutional provisions set forth in the bill, could not stop a drop of water from running into Kansas. Some one must construct the ditches and make the diversion to produce that result. If he takes water he is not entitled to, he is subject to an action either by the riparian proprietor or the prior appropriator. It is certainly competent for Colorado, having in view the most exacting demands of interstate ethics, to declare by both Constitution and statutes that the riparian doctrine is inapplicable to her natural condition, and that the doctrine of appropriation for beneficial uses should obtain. She thus makes the laws for her own citizens, within her

own territory. All that she may do by legislation in furtherance of that policy, either in the authorizing of corporations to construct ditches or fixing priorities in the order of appropriation, is in the exercise of her political power, which no other sovereignty can challenge. *Non constat*, but that the Constitution and laws of Colorado would preserve rather than destroy the property rights of the riparian owner in Kansas. They do not authorize the taking of another's property without compensation. They merely declare that within the State of Colorado the waters shall be treated as public property, and that so far as Colorado is concerned they may be appropriated, and that for that purpose individuals, firms and corporations may construct ditches and reservoirs.

If Kansas can impress her ideas upon Colorado by a controversial examination of the latter's laws in this Court, we may find that our last state is worse than our first.

Clearly the prayer of the bill is to control political action, concerning the futility of which this Court has already expressed its opinion.

Cherokee Nation *vs.* Georgia, 5 Peters, 1.

Georgia *vs.* Stanton, 6 Wallace, 74.

Without pursuing this discussion further, as the weakness of the bill would be demonstrated at every point of attack, we submit that no good to the State of Kansas can be subserved by permitting the bill to be filed.

Finally, as to the reasons which impel the appropriators in the Arkansas Valley in Colorado to adopt the unusual expedient of appearing in this case,

to which they are not parties by name, and protesting against the filing of the Bill, the following is submitted.

From the Bill itself, and if not, then from the construction placed upon it by the brief of the Attorney-General, it must be apparent that this proceeding is necessarily founded upon the theory that in the wholesale manner proposed, the claims of all the appropriators in Arkansas Valley in Colorado can be determined and finally adjudged invalid.

It says to all persons seeking homes in the Arkansas Valley, which this Court must know could not sustain any considerable population without irrigation, "Do not do it, as the lands are not entitled to the waters of the Arkansas River." To a land buyer, it says that the water for irrigation, without which Colorado land is valueless, will be taken away by this proceeding. Pending this litigation, the settlement of the Valley remains in suspense. The title to water for irrigation in the Arkansas Valley is not the only title impugned by this proceeding. The waters of the Platte and its tributaries flow into Nebraska, those of the Laramie River into Wyoming, those of the Grand into Utah and those of the Rio Grande into New Mexico. If the contention of the bill is good the deprivation of water in the valleys of all these streams awaits only similar actions by the other States and Territories.

If, as we insist and think we have abundantly proven, this proceeding must come to naught, why should the rights and interests of a courageous, progressive people be held up to the world as probably without foundation by the notoriety of its pendency in this Court.

Let the Court keep in mind the fact that irrigators in the Arkansas Valley and elsewhere have been invited to reclaim the desert by the general Government; by the several States and Territories; by the courts, both State and National; by the action of commercial bodies; by the action of all the political parties; by the custom and practices of fifty years; and by the history of the irrigated countries of the world, without a doubt having heretofore been raised as to their right to the use of water diverted for that purpose.

Many thousand acres in the Arkansas Valley have been settled upon and reclaimed upon the invitation of the Government, under the Desert Land Laws, many millions of dollars have been spent in canals, ditches, and reservoirs, the construction of which was invited by the Government through Congress, in granting rights of way.

The uniform course of decisions of the Federal and State courts has sustained the right to divert water for beneficial uses in the arid regions. All of the States and Territories in the arid region, *including specifically the State of Kansas*, have passed laws giving the right to divert water for irrigation and regulating and controlling the same.

At every session of Congress since 1888 Congress has appropriated money for the examination and investigation of the irrigation possibilities of the West, and has caused to be surveyed and platted a large part of the arid region for the purpose of aiding in securing proper sites and courses for reservoirs and ditches diverting water for irrigation.

The policy of the Goverment has been sustained by universal public sentiment and in particular by

every political party, as will be learned by reference to the platforms of the Republican, Democratic and Populist parties in 1900.

With all the past and present assurances of a good and valid title to the water applied to the otherwise desert land, is it a matter of surprise that we are now startled by a claim that all that has been done, must be destroyed, and that all that was hoped for must be abandoned, and that we are to remain in suspense until by the slow workings of this court a conclusion is evolved, as to whether the waters of the Arkansas and other rivers shall flow *ut currere solebat*, or whether they are to continue to drive the sage brush from the plains and place a mighty population there instead.

Does it not appeal to this Court as intolerable that a baseless proceeding should be allowed, which can have no effect but to inflict needless injury and loss upon those who by every rule and principle of simple justice are entitled to have the fair title to their homes protected in the same measure that their fair names should be shielded from causeless attack.

If the bill manifestly does not state a case of which this Court has jurisdiction, why should it be filed?

We respectfully pray that the application for leave to file be denied.

PLATT ROGERS,
Attorney for the Arkansas
Valley Ditch Association.